Supreme Court, U.S.
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No. 99-113

IN THE
SUPREME COURT OF THE UNITED STATES

VILLAGE OF NORTHFIELD,
Petitioner,

v.

10280 NORTHFIELD ROAD, LLC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING WRIT

According to United States Supreme Court Rule 15(6), a reply brief may be filed to address new points raised in Respondent's Brief in Opposition. The Rule states, in pertinent part, as follows:

> Any petitioner may file a reply brief addressed to new points raised in the brief in opposition.

Respondent has raised three new points to which this Reply Brief will address, to wit:

(1) The Petition for Writ of Certiorari should be denied because it, "At best, quarrels with the Sixth Circuit's application of a correctly stated rule of law." (Respondent's Brief in Opposition, p. 7).

(2) The Petition for Writ of Certiorari should be denied because, "The Sixth Circuit holding that a Federal District Court lacks authority to rewrite a State municipal ordinance is solidly rooted in settled law and does not merit review." (Respondent's Brief in Opposition, p. 7).

(3) The Petition for Writ of Certiorari should be denied because, "The Sixth Circuit holding that, even after being redrafted by the District Court, the ordinance remained an unconstitutional system of prior restraint." (Respondent's Brief in Opposition, p. 7).

Petitioner replies to each of these new points, as follows:

(1) The Petition for Writ of Certiorari should be granted because the Sixth Circuit did not apply the proper rule of law. The Sixth Circuit based its decision on a federal court's prohibition against the rewriting of a local ordinance. *Eubanks v. Wilkinson,* 937 F.2d 1118 (Sixth Cir. 1991). The properly stated rule of law, which is mutually exclusive of the rule set forth in *Eubanks*, is Ohio's law on severance, and the objective of a federal court to maintain an act in so far as it is valid. *Leavitt v. Jane L.*, 518 U.S. 137 (1996); and *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988); and *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678 (1987).

(2) The Petition for Writ of Certiorari should be granted because Respondent is relying upon an incorrect rule of law, which does merit review. Petitioner has not questioned or challenged a federal district court's prohibition against rewriting a State municipal ordinance.

(3) The Petition for Writ of Certiorari should be granted because the ordinance, as severed by the District Court, does not create an unconstitutional system of prior restraint. The severed ordinance is a constitutional time, place, and manner regulation. *Young, Mayor of Detroit, et al. v. American Mini Theaters, Inc., et al.*, 427 U.S. 50 (1976).

REPLY

Respondent, in its Brief in Opposition, promulgated that the issue of severability was precisely the rule of law utilized by the Sixth Circuit in analyzing this case. (Respondent's Brief in Opposition, p. 8). Contrary to Respondent's assertions, severability was **not**, "precisely the rule of law utilized by the Sixth Circuit in analyzing this case." In truth, the Panel, first and foremost, stated, "We must reject the District Court's attempt to salvage the ordinance because the District Court impermissibly rewrote the Village's ordinance." (Court of Appeals Opinion, Petitioner's Appendix, p. 10a).

The action undertaken by the District Court was clearly the severability of a local ordinance and not its rewriting. As such, the Sixth Circuit Panel failed to apply the correct rule of law, and in doing so, decided an important federal question contrary to the mandates of this Court.

Respondent has stated that under Supreme Court Rule 10, a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The rule of law, relied upon by the Sixth Circuit, was the general prohibition against federal courts rewriting statutes. This is not the proper rule of law. As such, the instant petition may not be analyzed in light of Rule 10, since the issues asserted do not consist of erroneous factual findings or the misapplication of a properly stated rule of law.

The Sixth Circuit Panel has not misapplied a properly stated rule, but failed to state the correct rule of law. It is clear that the severability of an ordinance and the rewriting of

an ordinance are two separate, mutually exclusive principles of law.

For example, determining that a local ordinance is unconstitutional, because it has been rewritten, cannot be saved by application of a state's law on severance. Once an ordinance is determined unconstitutional, because it has been rewritten, any analysis under a state's law on severability is insignificant and useless.

Conversely, determining that an ordinance is unconstitutional, because it cannot be severed, negates any need to apply the principle of law prohibiting federal courts from rewriting local ordinances. These two principles are clearly mutually exclusive. Therefore, the Panel's attempt to apply a two-tiered analysis first applying federal law prohibiting the rewriting of a local ordinance and then the cursory application of Ohio's law on severance, whole heartedly fails, and is only an attempt to justify an unsupported and unfounded decision.

As such, since these two principles of law are mutually exclusive; any application, whether cursory or not, of Ohio's law on severance by the Sixth Circuit was without merit, in light of their reliance upon the principle prohibiting a federal court from rewriting a statute. *Eubanks v. Wilkinson,* 937 F.2d 1118 (Sixth Cir. 1991). The correct rule of law is Ohio's law on severance, and the well-founded objective set forth by this Court to maintain an act in so far as it is valid. *Leavitt v. Jane L.*, 518 U.S. 137 (1996); and *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988); and *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987).

Secondly, Respondent's statement that, "The Sixth Circuit's holding that a federal district court lacks authority to

rewrite a state municipal ordinance is solidly rooted in settled law and does not merit review," has not been questioned by Petitioner. Once again, Respondent is relying upon an incorrect rule of law. The correct rule of law, upon which the Sixth Circuit Panel was obligated to apply, was Ohio's law on severance, as well as Supreme Court precedent requiring a federal court to maintain an act insofar as it is valid. *Geiger v. Geiger*, 117 Ohio St. 451, 160 N.E.2d 28 (Ohio 1927); and *Brock, supra*. Such application would clearly have affirmed the District Court's decision finding all remaining sections of Chapter 802 valid and constitutional.

Lastly, Respondent asserts that even after being redrafted by the District Court, the ordinance remains an unconstitutional system of prior restraint. This is Respondent's last ditch attempt to justify an unsupported and unfounded decision. It was only after the Panel held the ordinance unconstitutional based upon the District Court's, "attempt to salvage the ordinance as impermissively rewriting the Village's ordinance," that they stated:

> "Moreover, the District Court's reworking of the ordinance fails to provide the required 'specified and reasonable time period' during which the licensor must make a decision on an application for a Conditional Use Permit." (Court of Appeals Opinion, Petitioner's Appendix, p. 10a).

This issue was presented to the Sixth Circuit by Respondent facially challenging, "Whether the District Court's reworking of the ordinance was permissible and resulted in a constitutional ordinance." (Court of Appeals Opinion, Petitioner's Appendix, p. 9a). The Sixth Circuit explicitly held that the ordinance was not permissible because

the District Court engaged in the unlawful rewriting of an ordinance. The Panel's statement that the ordinance failed to include a specified and reasonable time for the licensing body to make a decision was only made in addition to its findings, and in an attempt to acknowledge the issue presented by Respondent. The opinion never explicitly stated that the ordinance, as amended by the District Court, was an unconstitutional system of prior restraint.

If the Sixth Circuit Panel had engaged in analyzing whether or not the amended ordinance resulted in an unconstitutional system of prior restraint, the only conclusion reached would have been that it does not suffer or create an unconstitutional system of prior restraint.

Where a conditional use permit ordinance concerns the rights of an adult bookstore to locate in certain areas rather than the right to disseminate or purchase particular items offered by the proposed store, such licensing scheme amounts to a valid time, place, and manner regulation, and therefore, does not constitute a "prior restraint" on speech protected by the First Amendment. *Young, Mayor of Detroit, et al. v. American Mini Theaters, Inc., et al.*, 427 U.S. 50 (1976).

The Village's ordinance is designed to restrict the location of adult entertainment businesses in an attempt to regulate the secondary effects of adult entertainment theaters on the surrounding community, and does not regulate the **content** of any items offered for sale or available for viewing at such establishments. Therefore, despite Respondent's attempt to argue that the amended ordinance suffers for failing to provide required "specified and reasonable" time periods for review, the Village's ordinance does not constitute a prior restraint on Respondent's First Amendment rights. It constitutes a reasonable and valid time, place, and manner

regulation pursuant to *American Mini Theaters*. In addition, the Village's ordinance satisfies the test set forth in *City of Renton, et al. v. Playtime Theaters, Inc., et al.*, 475 U.S. 41 (1986). No further analysis as to its constitutionality as a system of prior restraint is necessary.

CONCLUSION

The Sixth Circuit decision, based upon a facial challenge to a local ordinance unrelated to the expression of speech, should be reversed and the District Court's decision affirmed. The Sixth Circuit decision, as it states, conflicts with important federal question decisions by the Ohio Supreme Court and relevant decisions of this Court.

For all of the reasons previously set forth in its Petition for Writ of Certiorari and all of the reasons set forth herein, Petitioner respectfully requests this Court to grant its Petition for Writ of Certiorari. Without such grant, courts of this land, as well as various parties, will continue to distort the distinction between a federal court's prohibition on rewriting a local ordinance and maintaining act insofar as it is valid through the application of a state's law on severability.

Respectfully submitted,

/s/ _____
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